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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 E. W. BURTON,

12 Petitioner,

13 vs.

14 J. BEARD, Secretary,

15 Respondent.

Civil No. 15cv2314-LAB (MDD)

**ORDER DISMISSING CASE  
WITHOUT PREJUDICE**

16 Petitioner, a state prisoner proceeding pro se, has submitted a document which has been  
17 docketed as a Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254, in which he requests  
18 a stay and abeyance in this Court pending exhaustion of state court remedies in anticipation of  
19 the Ninth Circuit Court of Appeals granting his pending application to file a second or  
20 successive habeas petition in this Court challenging his state conviction.

21 Petitioner has not filed a Petition for a writ of habeas corpus in this action. Therefore,  
22 unless Petitioner is a capital prisoner, he has not initiated habeas proceedings in this Court.  
23 Calderon (Nicolaus) v. United States District Court, 98 F.3d 1102, 1107 n. 3 (9th Cir. 1996)  
24 (“Unlike non-capital prisoner who initiate habeas proceedings by filing a petition for a writ of  
25 habeas corpus, capital prisoners commence federal habeas proceedings by filing a request for  
26 appointment of counsel.”); McFarland v. Scott, 512 U.S. 849 (1994).

27 Petitioner does not contend that he is a capital prisoner, that is, a prisoner under sentence  
28 of death, and there is nothing in the documents he has submitted which indicates that he is a

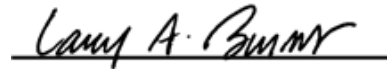
1 capital prisoner. If Petitioner wishes to proceed with a habeas action in this Court he must (as  
2 is the case with all non-capital prisoners) file a petition for a writ of habeas corpus, which will  
3 be given a separate civil case number. However, if Petitioner is in fact a capital prisoner, he may  
4 request the Court to re-open this action in order to permit him to file a Petition under the civil  
5 case number assigned to this action.

6 **CONCLUSION AND ORDER**

7 This action is **DISMISSED** without prejudice because Petitioner has not filed a Petition  
8 and has therefore failed to initiate federal habeas proceedings in this action. If Petitioner is a  
9 capital prisoner he may request to have this case reopened. If Petitioner is a non-capital prisoner,  
10 he may file a petition for a writ of habeas corpus which will be given a separate civil case  
11 number.

12 **IT IS SO ORDERED.**

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14 DATED: October 19, 2015

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16 **HONORABLE LARRY ALAN BURNS**  
17 United States District Judge  
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